In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 759

INTERTYPE COMPANY, A DIVISION OF HARRIS-INTERTYPE CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–23) is reported at 401 F. 2d 41. The Board's decision and order (Pet. App. 26–36) are reported at 164 NLRB No. 108. The underlying decisions in the representation proceeding (Pet. App. 37–50) are not officially reported.

JURISDICTION

The decree of the court of appeals was entered on August 23, 1968 (Pet. App. 24–25). The petition for a writ of certiorari was filed on November 20, 1968.

328-866—68

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly concluded that the employer's objections to a representation election did not warrant setting aside the election.

2. Whether, in the circumstances of this case, the Board properly quashed a subpoena calling for the affidavits and other documents obtained by Board personnel in the investigation of the case.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix to the petition (Pet. App. 51–53).

STATEMENT

1. THE REPRESENTATION PROCEEDING

Pursuant to a petition filed by the Union,[1] the Board conducted a representation election among petitioner's production and maintenance employees (Pet. App. 28; J.A. 13)[2] which the Union won by a vote of 111 to 91, with 5 challenged ballots (Pet. App. 28; J.A. 54). The Company filed timely objections to the election, and presented evidence to the Board's Regional Director in support thereof (J.A. 56–58; see

[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, AFL-CIO.

[2] "J.A." refers to the joint appendix filed in the court below, copies of which have been filed in this Court.

Pet. App. 44). The Regional Director, after an administrative investigation, overruled these objections, and certified the Union (Pet. App. 37–49). Thereafter, the Board denied the Company's request for review of the Regional Director's action (Pet. App. 50). The facts with respect to the objections in issue here are as follows:

Petitioner objected to a handbill distributed by the Union on the eve of the election, particularly to its last paragraph:

> The results of your decision will not be so simple. Vote "no" and you will give up the only chance you may ever have to vote on your future. VOTE "YES" and you will assure your right to a continuing vote and voice to help decide your own future. [J.A. 60.]

Petitioner contended that the handbill contained "material and substantial misrepresentations and inaccuracies and the timing of its distribution prevented effective reply by the Employer" (J.A. 56). The Regional Director found that there was no misrepresentation, since the reference to "vote on your future" was vague, and the word "may" indicated that a future election was possible even if the employees voted "no" in the coming election. The Director also found that, because of the full exposition of the pros and cons of unionization in the campaign, the employees were capable of evaluating, and thus were not misled by, the handbill. (Pet. App. 42–43.)

Petitioner also alleged that, on the day of the election, pro-union employees had circulated a rumor that a supervisor had stated that the Union had "better

get in or it would be hard on the girls and had made other statements supporting [the Union's] cause." Petitioner charged that the statements attributed to the supervisor "were erroneous and the timing of their dissemination prevented an effective reply by the Employer." (J.A. 56.) In support of this objection, petitioner submitted the names of three employees who heard the rumor (Pet. App. 44). The Regional Director's investigation revealed that Gordon Davis, a rank-and-file employee, had told four other employees about the statement alleged to have been made by the supervisor, and that the three witnesses presented by petitioner, who had heard various versions of Davis' remark,[3] all asserted that they did not believe it to be true and thus it had no effect on their vote (Pet. App. 44–46). The Regional Director concluded that Davis' conduct in spreading the rumor could not be attributed to the Union since he was not a Union agent, and that, in any event, the employees were fully capable of evaluating Davis' remarks (Pet. App. 46–47).

2. THE UNFAIR LABOR PRACTICE PROCEEDING

After certification, the Union requested the Company to furnish certain data to be used in connection

[3] Two of the witnesses stated that the rumor was that, if the Union did not come in, the Company would make it rough on employees. The other witness and Davis stated that the rumor was that the Company would make it rough regardless of the outcome. (Pet. App. 44–45.)

Although one witness thought that other employees may have been influenced by the remark, she had no evidence to support her belief (Pet. App. 46, n. 10).

with bargaining (Pet. App. 29; J.A. 98–99). Petitioner declined to furnish the information and refused to bargain, for the purpose of obtaining judicial review of the certification (Pet. App. 28–29; J.A. 100–101).

After an unfair labor practice complaint was issued, petitioner obtained *subpoenas duces tecum,* directed to the Regional Director, calling for "all files, documents, reports, memoranda, affidavits, notes, correspondence, and records pertaining to [the Region's] investigation or investigations" in the representation proceeding (Pet. App. 29; J.A. 104). The Trial Examiner, upon motion by counsel for the General Counsel, quashed the subpoena on the grounds that the matters would not be relevant to any issue properly before him, that the Regional Director's investigative file was not properly part of the record in the unfair labor practice proceeding, and, in addition, that the Company had failed to show any special need for the materials sought (Pet. App. 29–30; J.A. 105–106, 111–112).[4]

The Board approved the Examiner's ruling quashing the subpoenas, upheld the validity of the certification, and concluded that the Company, by its admitted refusal to bargain, violated Section 8(a)(5) and (1) of the Act (Pet. App. 26, 33). The Board ordered the Company to cease and desist from its unfair labor practice, and to bargain, upon request, with the Union (Pet. App. 33–34).

[4] The Examiner also granted the Union's motion to quash a subpoena directing it to produce, *inter alia*, a list of the In-Plant Organizing Committee (Pet. App. 30–31).

3. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order. It concluded that the Trial Examiner had properly quashed the subpoena directed to the Regional Director, since petitioner was entitled to statements obtained by the Regional Director in his investigation only if the persons giving the statements were called to testify; and that petitioner raised no issues which entitled it to a hearing (Pet. App. 18–20). The court also held that the Board properly concluded that neither the statements in the Union handbill nor the circulation of the allegedly false rumor warranted upsetting the election (Pet. App. 21–22).

ARGUMENT

1. Whether the Regional Director's action in overruling the Company's objections to the election is judged by an "arbitrary or capricious" standard, or by a "substantial evidence" standard (as petitioner contends, Pet. 7–11), the court below correctly sustained it. Since the handbill contained the word "may" and the pros and cons of unionization had been discussed by both the Company and the Union in the preelection campaign (see *supra,* p. 3), the Regional Director was justified in concluding that the handbill did not mislead employees into believing that, unless they voted for the Union at that time, they would never get another opportunity to select a representative.

Similarly, whether the Company's or Davis' version of his statement be accepted (see n. 3, *supra*), the Regional Director found, as the court below noted, that "those who heard the rumor, the Company's own

witnesses, testified that they were not influenced by it" (Pet. App. 22). In these circumstances, together with the fact that Davis spoke for himself and not as an agent of the Union, the court below correctly concluded that the "record readily supports the Board's finding that this rumor was innocuous" (*ibid.*).

2. Nor is there substance to petitioner's contention (Pet. App. 11–13) that it was entitled to the production of statements in the Regional Director's investigative file, under the rationale of *Jencks* v. *United States,* 353 U.S. 657. The *Jencks* decision merely requires the production of the statements of persons offered as witnesses at the trial. See 353 U.S. at 666–667. Here, there was no hearing, and, as the court below properly concluded (Pet. App. 19), petitioner raised no issues requiring one.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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